Editor's note: Appealed -- aff'd, No. 80-3371 (9th Cir. Oct. 1981)

UNITED STATES
v.
EDWARD T. McHENRY ET AL.

IBLA 79-231 Decided September 26, 1979

Appeal from decision of Administrative Law Judge Dean F. Ratzman declaring Good Rock A, Good Rock B, and Good Rock C placer mining claims null and void. Contest AA 9196.

Affirmed.

1. Mining Claims: Discovery: Generally

   Discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

2. Administrative Procedure: Burden of Proof -- Mining Claims: Discovery: Generally

   Where a Government mineral examiner testifies that he has examined a claim and found the mineral value insufficient to support a finding of discovery, a prima facie case of invalidity has been established. Government mineral examiners are not required to perform discovery work for claimants nor to explore beyond a claimant's workings.

3. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally

   When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the

burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made.

4. Mining Claims: Generally

It is a cardinal principle of mining law that mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineral might be found to justify mining development does not constitute a valuable mineral deposit.

5. Secretary of the Interior

The Secretary of the Interior has plenary authority over the public lands, including mineral lands, and has been entrusted with the function of making the initial determination of the validity of claims against such lands.

6. Mining Claims: Discovery

Discovery of gold sufficient to support a mining claim must be made on the claim itself, notwithstanding discovery of gold on nearby land which might persuade a reasonable prospector to continue his search for a valuable mineral deposit on the claim.

APPEARANCES: Edward T. McHenry, Mrs. Ruth E. McHenry, pro sese; Arno Reifenberg, Esq., Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for the Forest Service.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Edward T. McHenry and Mrs. Ruth E. McHenry have appealed, pro sese, from the decision of January 25, 1979, wherein Administrative Law Judge Dean F. Ratzman held the Good Rock A, Good Rock B, and Good Rock C placer mining claims null and void for the reason that mineral deposits have not been shown to be present on the claims in quantity, quality, and value to constitute a discovery under the mining laws. 1/

1/ The decision named four contestees, Edward T. McHenry, Ruth E. McHenry, Patricia Ryan, and Robert Clasby, as set forth in the complaint.

This proceeding arose with the filing of a complaint by the Bureau of Land Management at the request of the Forest Service, U.S. Department of Agriculture, charging that the Good Rock A, Good Rock B, and Good Rock C placer mining claims occupying approximately 120 acres in unsurveyed T. 7 N., R. 1 W., Seward meridian, Alaska, did not have exposed within their limits minerals in quantity, quality, and value to constitute a discovery. The contestees denied the charge, and the matter was heard by Judge Ratzman at Anchorage, Alaska, on July 21, 1978. Russell Arnett, Esq., represented the contestees at the hearing.

[1, 2, 3] We have reviewed the record in this case and find the Judge's decision adequately summarizes the testimony and evidence, and sets out the applicable law. We agree with the Judge's findings and conclusions, and adopt his decision in its entirety as the decision of this Board. A copy of the Judge's decision is attached hereto as Appendix A.

Appellants argue that their expert witnesses, having a collective professional experience in geology and mining greater than 100 years in Alaska, preponderated over the Government examiner who had only 7 years experience in Alaska and no credibility as to underwater suction dredging operations; that they had been following an orderly progression of prospecting as suggested by a consulting geologist; and that successful gold placering operations were being conducted in Canyon Creek, both upstream and downstream from their location, which geologically was favorably situated for the accumulation of placer gold. They suggest that the holding of Judge Ratzman to the effect that discovery is not shown when further exploration is necessary before the feasibility of development can be demonstrated (following United States v. Robinson, 21 IBLA 363, 82 I.D. 414 (1975)) is inimical to the development of mineral resources. They contend they have fully satisfied the prudent man test and the decision of Judge Ratzman should be reversed.

The Government's answer stresses that activity of the contestees was based, by geologic inference, upon what other miners in the general area have done, but no specific evidence or testimony was given as to amounts of gold actually recovered or as to the costs of their operations. The Government denies any bias in the Judge because of his scheduled departure from Anchorage and argues that the contestees' attorney did not allege any such conduct at the hearings. The Government states that rejection of the Jackson affidavit was proper and the Judge offered to allow the Jackson testimony into the record by either deposition or interrogatories, but that the contestees did not take up the offer. The Government points out that Moulton, the Government's mineral examiner, had no duty to make a discovery for the contestees, but merely to test the discovery points identified by the contestees, which he did. Finally, the Government states that the Judge's conclusions follow a long line of cases, the most recent of which is United States v. Edeline, 39 IBLA 236 (1979), that samples warranting further exploration are not discovery, and points out that the testimony of the contestees' expert witnesses was to the effect that further

exploration is warranted. The Government concluded that the record shows only that some gold can be recovered from Canyon Creek, but not in sufficient value or quantity to warrant any sustained effort at mining on the subject claims.

A prima facie case is established by the United States when the Government's mineral examiner testifies that he examined each claim under contest and could find no evidence showing discovery of a valuable mineral deposit. United States v. Harder, 42 IBLA 206 (1979); United States v. McClurg, 31 IBLA 8 (1977); United States v. Reynders, 26 IBLA 131 (1976). Government mineral examiners are not required to perform discovery work for claimants nor to explore beyond the claimants' workings. United States v. Bechthold, 25 IBLA 77 (1976); United States v. Blomquist, 7 IBLA 351 (1972).

The record adequately demonstrates that the Government established a prima facie case. A person who initiates a claim for public lands under the mining law by the ex parte act of entry is the true proponent of the rule or order within the ambit of the Administrative Procedure Act, 5 U.S.C § 556(d) (1976), which provides that the proponent of the rule or order has the burden of proof; thus after the Government has presented a prima facie case of invalidity of a mining location, the burden of proof is on the locator to establish all requirements for a valid location. United States v. Springer, 491 F.2d 239 (9th Cir. 1974); United States v. Bechthold, supra; United States v. Maley, 29 IBLA 201 (1977); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1976). The contestee in a mineral contest against unpatented mining claims must prevail, if at all, upon the strength of his own case, rather than upon any weakness of that of the Government.

The Government's mineral examiner Moulton testified that he had been on the subject claims on more than 12 occasions from their date of location by one Van Dusen. He had sampled several pans in 1973 or 1974, with a showing of gold worth $10 per yard (based on the price of gold at $210 per ounce), but to extract the auriferous material from cracks of rocks would require about a week to accumulate 1 yard of such material. In 1977, after the claims were acquired by the McHenry group, Moulton took more samples at sites suggested by McHenry, with a few colors showing in some pans, and no colors in others. All of Moulton's samples were taken along Canyon Creek, which he described as a rough and dangerous stream in which a suction dredge probably could not be worked except in early spring before breakup or in late fall when the water is down. Moulton did not sample the gravel benches above the creek channel, and the claimants did not suggest any discovery had been made in them. Moulton conceded he had no knowledge of any gold in the center of Canyon Creek. It was his opinion that a small suction dredge was a good prospecting tool, but insufficient for a full time mining operation, especially as the subject claims lack gravel bars.

Following this presentation, which is wholly adequate to make a prima facie case of no discovery, the burden shifted to the claimants to preponderate by presentation of probative evidence if they hoped to prevail. What did the claimants present?

The contestees' case was presented by the testimony of several expert witnesses, whose total testimony must be interpreted as saying that the Good Rock B claim is a site conducive to the deposition of gold transported by Canyon Creek and that the claim was well worth further exploration activity. Neither the contestees nor the expert witnesses on their behalf introduced any evidence from which it could be determined that there is gold of sufficient quantity and quality to justify a prudent person to expend time and means in anticipation of obtaining a paying mine. At best, the testimony was based on inference and not on actual recovery of gold in paying quantities. The results of sampling by Ryan generally paralleled those by Moulton.

[4] It is a cardinal principle of mining law that mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineral might be found to justify mining development does not constitute a valuable mineral deposit. Chrisman v. Miller, 197 U.S. 313 (1905). United States v. Robinson, 21 IBLA 363, 82 I.D. 414 (1975), cited by Judge Ratzman is merely one of many decisions of this Department which follow Chrisman v. Miller. See, e.g., United States v. Dillman, 36 IBLA 358 (1978); United States v. Johnson, 33 IBLA 121 (1977); United States v. Hanson, 26 IBLA 300 (1976); United States v. Bechthold, supra; United States v. Rigg, 16 IBLA 385 (1974); United States v. Woolsey, 13 IBLA 120 (1973); United States v. Taylor, 11 IBLA 119 (1973).

Discovery is the sine qua non to initiate a vested right against the United States under the mining laws. Premature location and recordation of a claim casts a cloud on the title of the United States. Davis v. Nelson, 329 F.2 840 (9th Cir. 1964). One who has located a claim upon the public domain has, prior to discovery of valuable minerals, only taken the initial steps in seeking a gratuity from the Government, and until he has fully met the statutory requirements, title to the land remains in the United States. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Multiple Use, Inc. v. Morton, 504 F.2d 448 (9th Cir. 1974).

[5] The Secretary of the Interior has, under grant of authority to supervise the public business on the public lands, including mining, the power to initiate contests through the Bureau of Land Management in order to see that valid mining claims are recognized, invalid ones eliminated, and the rights of the public preserved. Duguid v. Best, 291 F.2d 235 (9th Cir. 1961). The authority of the Secretary of the Interior to initiate proceedings to contest the validity of unpatented mining claims on the public domain does not depend upon assertion by the United States of some other use for the public lands, and establishment of clear title to the lands is sufficient justification. Davis v. Nelson, supra.

Where evidence falls far short of establishing that there is a sufficient gold deposit to induce a prudent person to expend further time and effort in the development of the deposit with a reasonable prospect of success, the requirement for discovery of a valuable mineral deposit has not been met. Multiple Use, Inc. v. Morton, supra. A reasonably prudent man, under the mining law, is a miner who has made discovery of a valuable mineral deposit, not a prospector who is still looking. Humboldt Placer Mining Co. v. Secretary of the Interior, 549 F.2d 448 (9th Cir. 1977).

[6] Discovery of gold sufficient to support a mining claim must be made on the claim itself, notwithstanding a discovery of gold on nearby land which might persuade a reasonable prospector to continue his search for a valuable mineral deposit on the claim. Humboldt Placer Mining Co. v. Secretary of the Interior, supra.

The record discloses no bias or improper conduct on the part of the Administrative Law Judge.

Other arguments proposed by appellants have been considered and deemed to have no merit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Joseph W. Goss
Administrative Judge

United States of America,	:	Contest No. AA-9196
	:	
Contestant	:	Involving the Good Rock A,
	:	Good Rock B, and Good
v.	:	Rock C. Placer Mining Claims,
	:	situated in T. 7 N., R. 1 W.,
Edward T. McHenry, et al.,	:	Seward Meridian (unsurveyed),
	:	Seward Recording District,
Contestees :		Alaska

DECISION

Appearances: Russell Arnett, Attorney, Anchorage, Alaska, for the Contestees

Arno Reifenberg, Regional Attorney, Office of the General Counsel, U.S. Department of Agriculture, Portland, Oregon, for the Contestant

Before: Administrative Law Judge Ratzman

MINING CLAIMS DECLARED NULL AND VOID

This contest was initiated by the Bureau of Land Management on behalf of the Department of Agriculture, on November 2, 1977. The contestees filed a timely answer which contravenes the charges in the complaint. The complaint asserts that there are not exposed within the limits of the above described claims, mineral deposits sufficient in quantity, quality and value to constitute a discovery.

A hearing in this proceeding was held in Anchorage, Alaska on July 21, 1978. The first witness at the hearing was Wesley Moulton, an employee of the U.S. Forest Service. He is a graduate mining engineer with more than 25 years experience in that profession. He has held responsible positions in private industry, has operated mines, and since 1963 has examined mining claims for the Forest Service. Tr. 4.

The three contested claims are on or near Canyon Creek, at approximately Milepost 48 on the Seward-Anchorage Highway. They are on the Kenai

Peninsula. The area in the vicinity of the claims is made up of shales, slates and mudstones containing scattered quartz veins. According to a geological survey report, at one time in the old days there were 324 miners on Canyon Creek, which is about eight miles long. Tr. 7. In 1973 or 1974, Mr. Van Dusen, who located the claims, told Mr. Moulton that he did not have gold pans or sluice boxes, and was interested in a home in the wilderness more than he was in mining. Tr. 8, 11. Among the improvements on the claims are a cabin and a woodhouse which has been converted to a sauna.

The contestees in this proceeding acquired three of the claims which had been located by Mr. Van Dusen, including the Good Rock B, which is the site of the cabin and other improvements. When he was on the claim with Mr. Van Dusen, Mr. Moulton spent several hours taking eight pans of material from cracks in the rocks at a point near the cabin on the Good Rock B (Sample GRB-1, Exhibit 3). He estimated that he obtained gold worth about $10 per yard (on the basis of a gold price of $210 per ounce). However, there is very little gravel -- in Mr. Moulton's opinion it would take about a week to get one yard. Tr. 10.

Sample GRB-2 by Mr. Moulton was taken on Good Rock B near the Good Rock C boundary. He found only a few colors there. Sample GRB-3 was obtained either from Good Rock B or Good Rock C, and was taken along the edge of the stream. In several pans he saw no colors. Tr. 12.

In 1977, Mr. Moulton met contestee Edward McHenry and asked the latter to show a discovery. At that time Mr. McHenry indicated the area where Mr. Moulton had taken the GRB-1 sample when the claims were owned by Mr. Van Dusen. The Forest Service mineral examiner took two or three pans and "got a few colors but . . . nothing very much." Tr. 13.

There are gravel benches on the contested claims but neither party submitted evidence that a profitable gold mining operation could be based on processing deposits or gravels from the benches. The primary question in this contest is whether suction dredging in Canyon Creek has sufficient promise to support the validity of the Good Rock B claim. There is little or no evidence to suggest that Good Rock A and Good Rock C could be mined or have been mined in recent years.

Mr. Moulton described Canyon Creek as a high, rough and dangerous stream. Tr. 13, 15, 46. Miners do not work in that stream in the summer -- the time when they could work with a dredge would be "perhaps early in the spring before breakup time, before the ice has gone out, or perhaps a week or two late in the fall when the water has gone down. . . ." Tr. 14. He views mining as an activity which is carried on eight hours a day, five days a week, and does not believe that a miner can spend eight hours in Canyon Creek operating a suction dredge. He considers a four-inch suction dredge as "a fine little piece of equipment to sample with and . . . wonderful from a recreation standpoint. . . ." Tr. 18.

Mr. Moulton has inspected the contested claims on more than twelve occasions and has walked over all three claims. In his opinion the "pay gold" was mined in the early days. Tr. 21, 30, 44, 50. The material available for dredging is insufficient for a profitable operation. Tr. 27. A miner who could get under the rocks in the stream might do very well for a short time, but a person operating a four-inch suction dredge could not make a living because Canyon Creek lacks gravel bars. Tr. 31, 37.

Mr. Moulton conceded he has "no knowledge whether in fact there is gold in the center" of Canyon Creek on the contested claims. Tr. 53.

Mr. Howard Grey, an experienced graduate geologist, testified that he understands there is an operating successful or profitable mine on Mills Creek, several miles upstream from the contested claims. Ted Jackson, who mines with a dredge on claims downstream from Good Rock A, B and C, apparently is recovering significant gold in Canyon Creek. Tr. 64. He did not know how much gold had been removed by Jackson in the last five years. Tr. 66. Mr. Grey cautioned that operating in the stream at high stage would be dangerous, but believes that a four-inch dredge could be utilized on the contested claims at certain times of the year. Tr. 65.

Mrs. Ruth McHenry testified that the mining claimants acquired the claims in December, 1976, from the widow of Steve Harris. They paid $5,200 for the claims, improvements and equipment, including two cabins, a meat house and an outhouse. Tr. 74.

Mrs. Irene Ryan is a registered mining engineer who graduated from the New Mexico School of Mines in 1940. She has worked as a consultant with respect to oil properties, gold mines and other mineral claims throughout Alaska. Her daughter, Patricia Ryan Clasby is one of the contestees. Tr. 76.

Mrs. Ryan expressed the view that the contested claims lie in a mineralized zone which extends from the Hope area to Seward. Lenses and veins of quartz which carry gold have been the source of lode and placer production throughout the area. Tr. 76. When a stream reworks material above the claims it concentrates gold which is broken out of the quartz. Therefore, the geological province of possible production still exists. Tr. 77. According to Mrs. Ryan, the Mills Creek-Canyon Creek stream system provides an ideal condition for continued working and concentration of "whatever gold is left there." Tr. 79.

Where the phyllite or shale in Canyon Creek is observed just below the cabin on the Good Rock B claim, it is a ribbed or practically vertical bedrock. Mrs. Ryan considers this to be an "ideal sluice box." Tr. 79. She believes new ridges are created each year by boulders which are moved by action of the stream, and this creates new pockets or cracks for the trapping and concentration of gold bearing material. When the flow of

water is at its greatest, Canyon Creek moves boulders which are substantial in size, at least a foot and a half in diameter. Tr. 83. Therefore, in her view, the creek bottom is never mined out. Tr. 80. She referred to instances during the Depression when miners in California returned to streams "and made a living when there was no other sort" by reworking gravels which had been "reworked possibly two or three times before." Tr. 80.

Mr. Jackson, another miner on Canyon Creek stated in the presence of Mrs. Ryan that he was getting "never less than a quarter of an ounce recovery," and that his operation was highly profitable. Tr. 80, 82.

Mrs. Ryan found pinhead colors in every second or third pan when she tested an area "without even going to bedrock . . . along the Canyon Creek-Mills Creek above the bridge in the area of the old worked out claims." Tr. 86. That quantity of gold is sufficient to make the investment of funds worthwhile to "take another look" or to explore the claim further. Tr. 86.

Mr. Jim Wolcott has mined with a suction dredge in Canyon Creek about four miles below the contested claims. He testified that he had "had real good success." On some days he does not recover much gold, but he stated that on the average he has recovered "around half an ounce" in four hours of operating a suction dredge. Mr. Wolcott is a contractor who has marine equipment. He did not mine in 1977. In 1976 someone took his pump or threw it in the river. Tr. 90. The longest period which he has devoted to mining is "about a week." He does not recall his recovery during that week. Tr. 91.

Mr. Edward T. McHenry, one of the contestees, is a fisheries research biologist for the Alaska Department of Fish and Game. He is employed at Resurrection Bay, near Seward. He testified that when Mr. Moulton tested the "discovery zone" the water level was one and one-half feet higher than normal. Tr. 94.

The actual discovery of the McHenrys and Clasbys was made in August, 1976, when one of their guests at a picnic scratched around in a depression and a coarse flake of gold came out under his fingernail. Mr. McHenry considers the spring period for mining on the claims to be around middle April to "mid-June probably at the most." Tr. 96. There also would be a period of about six weeks in the fall. Tr. 104.

The mining claimants purchased a four-inch dredge five weeks prior to the hearing, and had used it twice. In all of their panning and other mining work prior to mid-July, 1978, they had recovered .23 ounces of gold. In setting up and operating the dredge at an outcrop by the Forest Service footbridge on the Good Rock B claim and working the "uppermost cracks under a foot or two of gravel" they found about ".29 ounces in six hours." Tr. 99.

One week earlier they had utilized the dredge recovering some gold but not a great deal. They have purchased $2,400 worth of equipment, including the dredge. Tr. 101. This was done after a geologist told them that suction dredging is the only feasible way to mine the claims. Tr. 105.

Mr. McHenry asserts that nuggets and gold flakes command a premium price, and that $400 to $500 per ounce can be realized if the flakes are used in lockets. Tr. 104, 112.

When they dredged on July 8 and 9, the claimants utilized the first day to set up the dredge, tie it off and take other preparatory steps. After driving from Seward on the first day they worked from 10:00 a.m. to about 6:00 p.m. On July 9, they worked with the dredge from 9:00 a.m. until 5:00 p.m. On a schedule of that type the dredge actually runs for approximately four hours and dredges material for about one-half of the time. Working from 9:00 a.m. to 6:00 p.m. on July 15 and 16, they again were able to actually operate the equipment about four hours each day. Tr. 108-110.

Mr. Walter Phillips, who has an M.S. degree in geology from the University of Alaska and has worked for the Alaska State Geological Survey, and in a private capacity as a consultant, testified that on the basis of casual discussions with other miners in the vicinity he had concluded that significant quantities of gold are being recovered both upstream and downstream from the contested claims. He confirmed that he had recommended use of a three to four-inch suction dredge, with this comment:

> ". . . depending on the results of a year or two or maybe several years of operation with that [equipment] under the rather extreme conditions that are encountered in Canyon Creek gorge itself, that possibly a larger dredge would be appropriate for long-term mining plans but that at least in the near term until they better define the conditions in that stream that a small dredge would be very appropriate prospecting and probably mining tool." Tr. 121, 122.

Mr. John E. Ryan is the father of contestee Patricia Ryan Clasby. He has extensive experience with gold placering operations in the United States and overseas. He graduated as a mining engineer from the New Mexico School of Mines in 1940. He was an instructor for the School of Mines, University of Alaska, for three years. From 1972 to 1978 he had devoted full time to placer evaluations and production with equipment such as bucket line dredges and D-8 or D-9 cats. Tr. 127. In July, 1978, he spent six days evaluating the Good Rock B claim.

Mr. Ryan took samples along the stream just above and below the water level, at a time when the current was very rapid after a month of continual rain and snow melt. Seven samples taken above or to the north of the footbridge either produced no values or fell into the category of colors, flour gold

and black sand, with no recorded value. The larger (five pan or ten pan) samples obtained in or near the stream in the vicinity of the cabin or the footbridge ran between $3.25 per cubic yard and $23 per cubic yard, on the basis of the world market gold price in January, 1979.

Mr. Ryan concluded that his samples indicated "a range from no values to good prospects to very substantial recoveries of gold from several dollars to many dollars per cubic yard." He testified that this indicated there is economically recoverable yardage in the deep holes under water in the main channel of the stream if it is mined on a small or moderate scale. Tr. 131. He stated that much of "the gorge on Good Rock B is no doubt virgin ground." Tr. 132. He does not believe that practical miners would have placed a wing dam in the most dangerous and narrow part of the canyon. Tr. 133. In his opinion in the spring there will be sediment and gravel in the creek under the water. Tr. 143. He said to the Forest Service counsel:

> "I can't see any further in the ground than Mr. Moulton can or . . . you can, but there is certainly sufficient gold in there to warrant a prudent man to mine it. In fact, that is a very good property for a very small miner." Tr. 143.

He considers recovery by the mining claimants in their second weekend of dredging to have run at the rate of nine dollars per hour. Tr. 144. He indicated also that some Alaskans operate suction dredges in the winter under the ice. His estimate of the available mining season -- 100 to 110 days -- is longer than that of the other witnesses.

At the rebuttal stage of the hearing, Mr. Moulton testified that whether sufficient tonnage exists on the bottom of the stream "is something I don't know." Tr. 147. He described the place where Mr. Ryan obtained his best samples as an "area . . . on a sharp curve and the water comes down and around and if the gold was in there it would throw up on that side . . . it's very possible that he got samples like that." He pointed out that the Ryan samples "went down to practically nothing" at downstream locations. Tr. 149. In his opinion the quantity of material deposited on the curve in each year would be insufficient to support a worthwhile mining operation. Tr. 150.

Mr. Moulton has observed "many, many suction dredges" operated by experts but has yet to see one that was profitable over a long period of time. Tr. 152.

SUMMARY OF APPLICABLE LAW

The mining statutes do not expressly define a discovery. However, it has been held that one exists where:

> " * * * minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a profitable mine . . ." Castle v. Womble, 19 L. D. 457 (1894).

The above-quoted definition is approved in United States v. Coleman, 390 U. S. 599 (1968), which holds that in determining whether a mineral deposit is valuable, the Secretary of the Interior may require a showing that there is a reasonable expectation based upon the circumstances known at the time that the mineral can be extracted, removed and marketed at a profit. It is stated in Coleman:

> ". . . Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus profitability is an important consideration in applying the prudent man test . . . ."

A finding of mineralization may suggest the possibility of mineral of sufficient value and amount to justify further exploration, but it does not establish a discovery. Chrisman v. Miller, 197 U.S. 313 (1905). A discovery is not shown when further exploration is necessary before the feasibility of development can be demonstrated. United States v. Theresa B. Robinson, 21 IBLA 363 (1975). The quantity as well as the quality of available ore should be taken into account when the estimate of the value of a mineral deposit is made. United States v. Hines Gilbert Gold Mines Company, 1 IBLA 296 (1971). Occasional high samples would

not be conclusive evidence of a valid discovery. It is necessary to consider other factors, such as the extent of the mineral deposits, the number of samples assayed which show only a trace of mineral value, and the nature of the samples which yielded the high values. To be meaningful, the samples relied upon must be representative of the mineral deposit, not selective showings of the best mineralization. United States v. Alex Bechthold, 25 IBLA 77, 88 (1976).

Once the Government has established a prima facie case that a discovery is lacking, the burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery falls upon the claimants. Foster v. Seaton, 271 F. 2d 836 (D. C. Cir. 1959); United States v. Independent Quick Silver Company, 72 I.D. 367 (1965). The ultimate burden is on the mining claimant to prove that the charges by the contestant are not true and the mining claim is valid. A prima facie case that a discovery of a valuable mineral deposit is lacking is established when a Government mineral examiner gives his expert opinion that he examined a claim and found insufficient values to support a finding of discovery. United States v. Alex Bechthold, supra. East Tintic Consolidated Mining Company, 40 L.D. 271 (1911), cited with approval in Henault Mining Company v. Tysk 419 F. 2d 766 (9th Cir. 1969), states that the finding of mere surface indications of mineral within the limits of a claim, the discovery of valuable mineral deposits outside the claim, or deductions from established geological facts relating to the claim -- "one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim" -- will neither suffice as a discovery nor be entitled to acceptance as the equivalent of a discovery.

It is the obligation of a mineral claimant to maintain adequate business records or other means of proof to support his contentions as to sales and marketability at a profit of the mineral in his claim. Herb Penrose, 10 IBLA 332 (1973). Labor costs must be taken into account when one considers whether proposed mining operations have a reasonable prospect of success -- there is no reason to treat the value of the labor of a locator any differently from that of a person he might hire. U.S. v. Vernon O. and Iva C. White, 72 I.D. 522 (1965) affirmed 404 F. 2d 334 (9th Cir. 1968). Other expected costs of mining operations should also be taken into account. U.S. v. Hines Gilbert Gold Mines Company, 1 IBLA 296 (1971).

Determination

When driving time going from and returning to Seward is included, the Contestees devoted approximately eighteen hours to their mining operation on July 15 and 16, 1978, the weekend when .29 ounce of gold was recovered. It is clear that Mr. Phillips' description of conditions in the stream -- "rather extreme" -- is correct. It is established

by the preponderance of the evidence that the claimants can expect to operate their dredge in the stream about twelve weekends in each year. Savings and loan institutions offer a return of 8% or more at the present time for deposits of at least $1,000. For a comparable return the claimants should recover about $50 per weekend, taking into account their purchase price for the claims and investment in the dredging equipment. Once the first $50 has been applied for that purpose, this leaves less than $25 as return from mining on the July 15-16 weekend for 36 man-hours of work (this calculation is based upon the current price paid for gold on the world market, approximately $230 per ounce). Additional expense will be incurred for gasoline for the dredge, transportation to and from the claims, and for capital required for replacement of the dredging equipment when it wears out.

Several of the experts who testified for the contestees are optimistic about the quantities of gold which may be recovered from the stream channel. However, the fact remains that dredging in the channel has not been carried out either in the spring or in the fall. No reliable estimate has been given of the amount of time that will be required to move boulders, which, according to Mrs. Ryan, will run up to eighteen inches in diameter. There is no estimate of the time that will be lost because of equipment breakdowns, or required to remove material which has plugged the orifice of the small dredge. Mr. Phillips' reference to the four-inch dredge as a "very appropriate prospecting and probably mining tool" is indicative of the fact that the geologists and mining engineers can only speculate as to the quantity and content of the materials in the stream channel.

Except for Mr. Wolcott, who has dredged sporadically and with varying degrees of success, the other miners on the stream were not available for cross-examination. It is possible that they do not calculate on a realistic basis the hours which they devote to mining. A calculation based merely on the number of hours the dredge is in the stream would be misleading.

Mr. Moulton learned that an earlier claimant, Mr. Van Dusen, did not have mining equipment and was not mining. The total recovery made by the Clasbys and McHenrys in 1977 and 1978 was approximately .52 ounce of gold.

The contestant established a prima facie case that the Good Rock A, B and C claims are null and void because no discovery of valuable minerals has been made. The contestees are maintaining cabins, a meat house and a sauna on one of the claims. The temptation to acquire and utilize the claims for a weekend and vacation retreat is obvious. They are in a beautiful wooded area along a stream. The contestees are long on witnesses but short on proof related to dredging in the channel, specific quantities of material which can be processed, and the economics of working with a small dredge. Their case is based largely on deductions from established geological facts relating to the claims, evidence of

mere surface indications of mineral value, and asserted discoveries of valuable mineral deposits outside the claims. Cases cited above in the Summary of Applicable Law, including the old East Tintic decision, make it plain that proof of this nature does not establish a discovery.

As to each of the claims in this contest the contestant has established that there is a lack of mineral deposits sufficient in quantity, quality and value to constitute a discovery. Accordingly, the Good Rock A, Good Rock B and Good Rock C placer mining claims are hereby declared null and void.

Dean F. Ratzman
Administrative Law Judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1977). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken, the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with a copy of the notice of appeal and other documents is the attorney for the United States Department of Agriculture whose name and address appear below.

Enclosure: Additional information concerning appeals.

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